No. 77-450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LARRY PRESSLER,
Member, United States House of Representatives,
Appellant,

v.

WARREN M. BLUMENTHAL,
Secretary of the Treasury;
FRANCIS R. VALEO,
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES M. JEFFORDS, *et. al.*,
Amici

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

No. 77-450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LARRY PRESSLER,
Member, United States House of Representatives,
Appellant,

v.

WARREN M. BLUMENTHAL,
Secretary of the Treasury;
FRANCIS R. VALEO,
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES M. JEFFORDS, *et. al.*,
Amici

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE
BRIEF IN SUPPORT OF APPELLANT

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes and Regulations

Other

No. 77-450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LARRY PRESSLER,
Member, United States House of Representatives,
Appellant,

v.

WARREN M. BLUMENTHAL,
Secretary of the Treasury;
FRANCIS R. VALEO,
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES M. JEFFORDS, *et. al.*,
Amici

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANT

1. Congressman James Jeffords, on behalf of himself and on behalf of Congressmen James Abdnor (R-S. Dakota), Clarence Miller (R-Ohio), Charles Grassley (R-Iowa), Richard Gephardt (D-Missouri), Romano Mazzoli (D-Kentucky), John Duncan (R-Tennessee), James Collins (R-Texas), Berkley Bedell (D-Iowa), Millicent Fenwick (R-N.J.), Leon Panetta (D-Cal.), Margaret Heckler (R-Mass.), Nick Joe Rahall (D-W. Va.), Mickey Edwards (R-Okla.), Robert Walker (R-Penn.), James Cleveland (R-N.H.), Anthony Moffett (D-Conn.), Dan Glickman (D-Kansas), and William Cohen (R-Maine) requests leave of the Court to submit an *amicus curiae* brief in support of the appeal by Congressman Larry Pressler (No. 77-450).

2. Congressman Jeffords submitted an *amicus* brief in the case below and has maintained an active interest in the case from its inception.

3. Congressman Pressler has consented to and expressed his interest in this *amicus,* but attorney for an Appellee has stated his objection to the submission of it.

4. While Congressman Pressler has expressed his views articulately on the merits of his case, we believe it is important to establish that his views are not isolated but represent a broad spectrum of the Congress, and that the bipartisan nature of the group of Congressman submitting this *amicus* is an important indication to the Court that Congressional procedures have been such as to frustrate the voice of a majority of the Congress on an issue of vital importance to the Congress and its national constituency.

5. The Congressmen here submitting this request to file such *amicus* believe the Court's decision in this appeal will have a direct impact on the actions of the *amici* in discharging their constitutional obligations under Article I, Sections 1 and 6. Second, the disposition of this appeal will substantially affect the ability of the voters represented

by the *amici* to determine the position of their elected representatives with respect to the rates of Congressional pay. Third, the rates of compensation paid to each of the *amici* as members of Congress may be directly affected by the Court's decision in this appeal.

No. 77-450

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LARRY PRESSLER,
Member, United States House of Representatives,
Appellant,

v.

WARREN M. BLUMENTHAL,
Secretary of the Treasury;
FRANCIS R. VALEO,
Secretary of the United States Senate;
KENNETH R. HARDING,
Sergeant-at-Arms of the United States
House of Representatives,
Appellees.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF Congressmen James Jeffords, James Abdnor, Clarence Miller, Richard Gephardt, Romano Mazzoli, John Duncan, James Collins, Berkley Bedell, Millicent Fenwick, Leon Panetta, Margaret Heckler, Nick Joe Rahall, Mickey Edwards, Robert Walker, James Cleveland, Anthony Moffett, Dan Glickman and William Cohen, AS *AMICI CURIAE*

Interest of the Amici

The *amici curiae* submitting this brief are duly elected members of the Ninety-Fifth Congress of the United States. As members of Congress, the *amici* have a three fold interest in the outcome of this appeal. First, the Court's decision in this appeal will have a direct impact on the actions of the *amici* in discharging their constitutional obligations under Article I, Sections 1 and 6. Second, the disposition of this appeal will substantially affect the ability of the voters represented by the *amici* to determine the position of their elected representatives with respect to the rates of Congressional pay. Third, the rates of compensation paid to each of the *amici* as members of Congress may be directly affected by the Court's decision in this appeal.

ARGUMENT

I. THE STATUTORY PROVISIONS AT ISSUE SUBSTANTIALLY IMPAIR THE EFFICACY OF THE VOTE OF EACH MEMBER OF CONGRESS.

The rate of compensation for each Member of Congress is presently computed on the basis of two statutes: The Postal Revenue and Salary Act of 1967[1] and the Executive Salary Cost-of-Living Adjustment Act of 1975.[2] Under these statutes, Congressional salary rates are adjusted periodically in amounts determined by the

1. Pub. L. No. 90-206, 81 Stat. 642, *codified at* 2 U.S.C. §§ 351-361.

2. Pub. L. No. 94-82, 89 Stat. 421, *codified at* 2 U.S.C. § 31.

President.[3] Congressional involvement in the adjustment of its members' compensation is restricted under both statutes to a limited power of disapproval. To exercise this power of disapproval, one House of Congress must act affirmatively within thirty days to reject the salary adjustments recommended by the President. In the absence of an affirmative resolution of disapproval, the salary rates recommended by the President automatically go into effect.

Amici believe that the statutory procedures for Congressional disapproval of Presidential salary recommendations substantially impair the efficacy of their votes as Members of Congress in ascertaining the rates of Congressional compensation.

The power of Congressional disapproval under the statutes at issue in this appeal must be exercised, if at all, within thirty days of the relevant Presidential salary recommendation. In legislative terms, thirty days is an extremely brief period of time for securing any type of affirmative action. Although Congress has, on occasion, taken affirmative action on a matter in less than thirty days, such expeditious treatment normally is possible only when there is overwhelming support in favor of the measure and there is some extraordinary outside circumstance requiring extremely speedy action. As a consequence, even though a majority of one House of Congress may be opposed to a salary adjustment recommended by the President, the thirty day time limit on the power of disapproval may make it impossible for Members of Congress to have an opportunity to cast their votes.

3. Both the Salary Act, *supra*, note 1, and the Cost-of-Living Act, *supra*, note 2, provide for commissions to study and report on appropriate salary adjustments. These commissions report to the President, who, in turn, recommends to Congress the adjustments which go into effect unless the increases are rejected by a resolution of disapproval. 2 U.S.C. §§ 31 (2), 351-359, 5 U.S.C. § 5305.

The reverse nature of the disapproval power, which allows new governmental action to be initiated if no Congressional action is taken, also impairs the efficacy of each Member's vote. The parliamentary procedures used in the Senate and House of Representatives have been developed solely to regulate the process by which Congress enacts affirmative legislation. These parliamentary procedures include numerous methods by which a small minority can delay action that is desired by a substantial majority. So long as Congress is acting by affirmative legislation, all of the various procedural devices for delay tend to have the salutary effect of ensuring that Members of Congress will have ample time for deliberation and consultation before some new governmental action is taken. In the case of a thirty day disapproval power, however, all of the devices for delay operate to frustrate, rather than foster, the goal of deliberate Congressional action.

In the final analysis, the decision to bring a salary adjustment disapproval resolution up for floor action depends not upon the will of the majority in either House, instead it depends almost exclusively upon the discretion of the majority leadership and the committees to which the resolution has been referred.

Disapproval resolutions, like all other legislative proposals, are normally referred to committees after introduction. If the House and Senate committees fail to report a disapproval resolution in time for floor action within the statutory thirty day time limit, the pay raise recommendation in question will normally take effect without any opportunity for Members of Congress to vote on the question. This, in fact, has been the fate of virtually all of the salary adjustment disapproval resolutions introduced in the past.[4]

4. See notes 9-11, *infra*.

In the House of Representatives there are only two basic ways that a disapproval resolution not reported by committee can be brought to the floor for a vote: By motion to discharge the committee and by motion to suspend the rules. Neither of these devices is of any significant value in forcing a vote on a salary adjustment disapproval resolution.

Motions to discharge a committee cannot be introduced in the House until the measure that is the subject of the motion has been pending before the committee for more than thirty days.[5] Since Congressional power to disapprove a pay raise recommendation is limited to thirty days, the salary adjustment in question will always take effect before a motion to discharge can be introduced. Moreover, the motion to discharge a committee would probably be of little value even if the statutory period for disapproval was longer than thirty days. Motions to discharge are rarely introduced, largely because of traditional deference to the committee system. Furthermore, the relatively few motions to discharge that are introduced frequently fail because such a motion cannot be acted upon until a majority of the full House has formally joined in sponsorship of the motion.[6]

Motions to suspend the rules are of equally little value in forcing floor action in the House or a disapproval resolution stalled in committee. Motions to suspend the rules normally are in order in the House only on the first and third Mondays of each month. Motions to suspend the rules require a two-thirds majority for passage and must, upon demand by any Member, be seconded by a simple majority in a teller vote.[7] Finally, and most importantly,

5. House Rule XXVII. 4.

6. *Id.*

7. House Rule XXVII. 1, 2.

the Speaker of the House has absolute discretion in recognizing any Member who rises to move suspension of the rules.

In the Senate, the procedures for bringing a measure stalled in committee to the floor are somewhat more flexible than those in the House. Motions to discharge a committee may be introduced in the Senate without a waiting period and passage requires only a simple majority. Motions to suspend the rules in the Senate also may be introduced at any time. However, if any Senator objects to either type of motion, the motion must lay over one day, after which it is eligible for floor action in the order of its placement on the calendar. As a practical matter, the leadership of the Senate can avoid floor action on any such motion by recessing each legislative day before the measure comes up on the calendar. This was the fate of one of the Senate efforts to disapprove the most recent Congressional pay raise recommendation.[8]

One final method for forcing floor action is available in the Senate. That method is to offer the disapproval measure as an amendment to some other unrelated legislative business. This alternative is possible because the Senate does not normally require that amendments be germane to the subject matter of the proposal being amended. A disapproval resolution offered in the form of an amendment to some other legislative proposal, however, is still subject to the possibility of a filibuster as well as the possibility that the underlying proposal could be defeated.

In the face of all of these obstacles, the ability of individual Senators and Representatives to record their votes on the "enactment" of a salary adjustment is severely curtailed.

---

8. See 123 Cong. Rec. S 2127, 2128 (Feb. 3, 1977).

II. THE STATUTORY PROCEDURES AT ISSUE IN THIS APPEAL SUBSTANTIALLY IMPAIR THE VOTERS' ABILITY TO ASCERTAIN THE POSITION TAKEN BY THEIR SENATORS AND REPRESENTATIVES.

One of the essential elements of any representative democracy is the ability of the voters to ascertain the position taken by their elected officials. To preserve the representative character of Congress, Article I, Section 5 of the Constitution requires that:

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same. . .; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present be entered on the Journal.

Thus the constitution contemplates that no new governmental action can be authorized by Congress without: (1) a record being made of the action in the Journal of each House and (2) a record being made of each Member's vote if such a record is requested by one-fifth of the Members present.

The statutory procedures for adjusting Congressional pay at issue in this appeal effectively nullify all of the protections afforded to the public by Article I, Section 5. Under the statutes in question, there is no instance in which either House must vote to enact an increase in the salary rates for its members. Raises recommended by the President under the Salary Act can go into effect without any recorded action by either House, much less any recorded vote. Under the Cost-of-Living Adjustment Act, pay raises normally go into effect without even the possibility of Congressional disapproval.

Although either House of Congress can record its support in favor of a recommended pay raise if it wishes to do so, the actual experience under the statutes clearly shows that Congress is extremely reluctant to voluntarily record its views in support of a pay raise. To date, three Congressional pay raises have been recommended by the President under the Salary Act. Forty-seven Representatives introduced thirty-four resolutions of disapproval with respect to the first pay raise recommendation in 1969.[9] Ninety-five Representatives introduced sixty-three resolutions to disapprove the second pay raise recommendation in 1974.[10] Seventy-one Representatives introduced thirty-three resolutions to disapprove the third pay

9. H. Res. Nos. 128, 133, 136, 138, 139, 144, 145, 147, 149, 153, 155, 158, 162, 164, 165, 166, 170, 171, 173, 178, 181, 183, 186, 187, 190, 195, 196, 205, 208, 209, 210, 215, 221, 222, 91st Cong., 1st Sess. (1969). All of these disapproval resolutions were referred to the House Post Office and Civil Service Committee. That Committee did not organize itself in time to take action on any of the resolutions before the effective date of the recommended pay raise. In an effort to force floor action, fifteen Representatives introduced fourteen resolutions requiring consideration of the disapproval matter by the whole House. H.R. Res. Nos. 142, 146, 150, 159, 163, 172, 179, 188, 191, 193, 194, 203, 206, 207, 91st Cong., 1st Sess. (1969). These resolutions were referred to the House Rules Committee, which voted in executive session to table the measures.

10. H. R. Res. No.s 806, 807, 808, 811, 812, 813, 186, 817, 819, 820, 821, 826, 827, 828, 830, 831, 833, 834, 836, 837, 839, 841, 842, 844, 845, 849, 850, 851, 852, 853, 861, 866, 868, 869. 870, 875, 876, 879, 880, 882, 887, 888, 890, 891, 892, 893, 905, 908, 909, 910, 913, 914, 919, 922, 924, 925, 927, 936, 940, 941, 942, 946, 958, 93rd Cong., 2d Sess. (19740. These resolutions were referred to the House Post Office and Civil Service Committee. That Committee initially avoided the issue by failing to form a quorum, but four days after the Senate Post Office and Civil Service Committee reported a resolution that would have disapproved only the Congressional portion of the President's recommendations, the House committee reported a resolution (H. R. Res. 807) disapproving all of the pay raise recommendations, including the raises proposed for the Judicial and Executive branches. H. R. Rep. No. 870, 93rd Cong.,

raise recommendation in 1977.[11] Not a single one of these one hundred thirty disapproval resolutions ever reached the floor of the House or received a vote of any sort by the House membership.

The record in the Senate is only slightly better. A resolution to disapprove the first pay raise recommendation did reach a floor vote in the Senate in which disapproval was defeated by a narrow vote of 34-47.[12] The Senate passed by an overwhelming 71-26 majority a resolution disapproving the second pay raise recommendation.[13] A resolution to disapprove the third pay raise was defeated in the Senate by a vote of 42-56 on a motion to table.[14]

There is probably no coincidence in the fact that the House of Representatives (whose Members must stand for election every two years) has never voted on a Salary Act disapproval resolution while the Senate (whose members stand for election only every six years) has taken at least some form of recorded vote on each Salary Act

10. continued
2d Sess. (1974). The Senate resolution was amended on the floor to disapprove all of the pay raise recommendations and passed on March 6, 1974. Thereafter no action was taken by the House on the resolution reported by the House committee.

11. H. R. Res. Nos. 115, 126, 129, 135, 152, 191, 197, 201, 211, 225, 243, 244, 245, 247, 249, 250, 253, 254, 255, 258, 249, 260, 263, 264, 265, 272, 276, 277, 278, 281, 288, 290, 292, 95th Cong., 1st Sess. (1977). These resolutions were referred to the House Post Office and Civil Service Committee. That Committee held hearings on the disapproval issue but failed to report any of the resolutions out of committee.

12. *See* 115 Cong. Rec. 2716 (February 4, 1969).

13. *See* 120 Cong. Rec. S2878-2900 (March 6, 1974).

14. *See* 123 Cong. Rec. S2016 (February 2, 1977).

recommendation. It is also probably no coincidence that the one Salary Act recommendation actually disapproved was the only one which came before the Congress in a Congressional election year.

In addition to the Salary Act increase, there has been one Cost-of-Living Act adjustment. Under the terms of that act, the cost-of-living adjustment was not subject to Congressional disapproval. However, since the amount of the adjustment exceeded the amounts available under the Legislative Branch Appropriations Act, disbursements could not be increased to the rate ordered under the adjustment.[15]

In short, since 1967 two Congressional pay raises have gone into full effect, one has been defeated, and one has been nullified for lack of appropriations, but the voters have no recorded action by the House of Representatives on any of these pay raise measures and none of the votes recorded in the Senate were required by the statutes for the pay raises to go into effect. This performance falls far short of satisfying the voters' legitimate need to ascertain the position of their Senators and Representatives with respect to rates of Congressional pay.

III. THE ISSUE PRESENTED BY THIS APPEAL IS A TIMELY AND UNPRECEDENTED ONE WHICH DESERVES PLENARY CONSIDERATION IN THIS COURT.

As the District Court noted in its opinion, the issue presented by Congressman Pressler in this case is one of first impression. Memorandum Opinion at 5. No prior decision has ever considered the scope of Congress'

15. *See* Executive Order 11941 (October 1, 1976), 41 Fed. Reg. 43889, at 43894 (October 5, 1976).

obligations under Article I, Section 1 and the ascertainment clause of Article I, Section 6. The unprecedented nature of the question presented by Congressman Pressler, by itself, warrants plenary review of the appeal by this Court.

The issue presented is also one of timely and substantial public importance. In the past month, Members of Congress received a very sizeable pay raise under the Salary Act. Although the size of the pay raise was controversial, public concern focused primarily on the statutory procedures that allowed Congress to raise its own salary by doing nothing. Even those who defended the amount of the recent pay raise were almost unanimous in their condemnation of the statutory procedures at issue in this appeal.[16] The prospect of another automatic pay raise in October of this year has heightened public concern over the statutory procedures for adjusting Congressional pay.[17]

The issue presented in this appeal is also important because it is closely related to the broader controversy over the constitutionality of any form of Congressional veto. For years scholars have debated whether the Congressional veto device impermissibly impairs the veto power of the Executive branch.[18] At least four Presidents[19] and three

16. *See, e.g.*, Washington Post, Feb. 6, 1977, C-6, cols. 1 and 2.

17. *See, e.g.*, Washington Star, March 2, 1977, A-18, cols. 1 and 2.

18. *See, e.g.*, Boisvert, *A Legislative Tool for Supervision of the Administrative Agencies: The Laying System*, 25 Fordham L. Rev. 638 (1957); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 Geo. Wash. L. Rev. 468 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569 (19530; Stewart, *Constitutionality of the Legislative Veto*, 13 Harv. J. Legis. 593 (1976); Stone, *The Twentieth Century Administrative Explosion and After*, 52 Calif. L. Rev. 513 (1964); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. Ll Rev. 983 (1975).

19. 59 Cong. Rec. 8609 (1920) (veto message of President Wilson); 76

Attorneys General[20] have argued that legislative vetoes of various form are unconstitutional. Congress itself has studied but never resolved the question.[21] The issue was raised but not decided in *Buckley* v. *Valeo,* 424 U.S. 1 (1976).[22] The issue is again before this Court in *Clark* v. *Valeo*, No. 76-1105 (docketed February 9, 1977). Although the *amici* express no opinion on the merits of the arguments in *Clark* v. *Valeo,* they believe that plenary review of that case together with the appeal herein would present the Court with a unique opportunity to examine the effects of the Congressional veto on both the Legislative and the Executive branches of government.

CONCLUSION

For the reasons stated above, the *amici* believe that probable jurisdiction should be noted in this appeal.

---

19. continued

Cong. Rec. 2445 (1933) (veto message of President Hoover); Jackson, *A Presidential Legal Opinion,* 66 Harv. L. Rev. 1353, 1357-1358 (1953) (memorandum from President Roosevelt to then Attorney General Jackson); H. R. Doc. No. 520, 82d Cong., 2d Sess. 7 (1952) (veto message of President Truman).

20. 37 Ops. Atty. Gen. 56 (1953); Jackson, *A Presidential Legal Opinion,* 66 Harv. L. Rev. 1353, 1355-1357 (1953); Unpublished memorandum dated January 31, 1977 from Attorney General Griffin Bell to President Carter.

21. *See, e.g.,* Senate Committee on Government Operations, Vol. II, Congressional Oversight of Regulatory Agencies, at 116, 95th Cong., 1st Sess. (1977).

22. 424 U.S. at 140 n. 176, *but cf. id.* at 282-286 (White, J., concurring & dissenting). *See* Clagget & Bolton, *Buckley v. Valeo, Its Aftermath and Its Prospects: The Constitutionality of Government Restraints on Political Campaign Financing,* 29 Vand. L. Rev. 1327, 1344-1353 (1976).